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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 582

TRIPLE "AAA" COMPANY, INC., and D. G. CARPENTER,
Petitioners,

VERSUS

W. WILLARD WIRTZ, Secretary of Labor,
United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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August, 1967

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In the

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Comes now the petitioners above named and show to the Court that on July 5, 1967, the United States Court of Appeals Tenth Circuit affirmed the judgment of the United States District Court for the Western District of Oklahoma, in which the last named court the petitioners were defendants, and the respondent was plaintiff.

The opinion not having yet been published is attached to this petition as an Appendix.

STATEMENT OF THE CASE

I.

The Secretary of Labor commenced this suit in the United States District Court by authority of 29 U.S.C.A.,

Art. 217, to enjoin alleged violations of the Fair Labor Standards Act of 1938, 29 U.S.C.A., Arts. 201-219, as amended.

II.

The trial court enjoined the petitioners and ordered the petitioners to pay the four (4) employees involved, the sum of $2,557.69.

III.

This case presents an unusual situation by reason of the fact that all of the four (4) employees involved were receiving substantial compensation and had been employed for many years by the petitioners. Charles V. Brown has been employed since 1952 and was paid at a rate of $1.96 per hour and at the rate of $2.94 per hour for the four hours' overtime each week. This rate was the rate in 1965. This suit was filed April 22, 1965. All of the employees testified that the petitioners agreed to pay a sum each month and, also, they were to work forty-four (44) hours per week. Every employee knew the exact amount he or she was being paid for the forty (40) hours per week and the amount for the four (4) hours' overtime each week. This was written into the face of every check given to the employees.

The employees testified that they were satisfied and asked the court, in effect, to dismiss the case but the respondent insisted on prosecuting the case in the face of the fact that each employee also filed a written request and affidavit stating that he or she had been fully compensated.

This is a small company and it has given to its employees, when possible, large bonuses and, in fact, has put forth a great effort to pay to the employees a very liberal compensation.

The case presents substantially this question:

Can an employer, who pays more than the minimum wage, make an agreement with his employees to pay them a monthly rate far in excess of the minimum wage, and break the payment down, with the knowledge and approval of the employees, into a pay rate for forty (40) hours and time-and-a-half for four (4) hours' additional work by employees on Saturday?

Every employee knew what he or she would receive each month; each employee likewise knew how much was for *"regular time"* and how much was for *"overtime."*

The complaint sets out that the employee, A. B. Carpenter, between November 10, 1962, and November 15, 1964, received a salary of $250.00 semi-monthly or $500.00 per month.

Charles V. Brown received from July 1, 1964 to November 15, 1964, $200.00 semi-monthly, shown as $147.33 regular time and $52.67 overtime.

That Ursula Engelbach, from June 1, 1963 and July 30, 1964, received compensation in the amount of $196.88 semi-monthly, shown $143.00 regular time and $53.60 overtime.

That Gilbert Tuppker, during the work week between November 10, 1962 and November 15, 1964, received $250.00 semi-monthly.

These are the four (4) employees involved.

The employee, A. B. Carpenter, is Vice-President of the Triple "AAA" Company, Inc., and is a stockholder therein.

The employee, Mrs. Ursula Engelbach, was a bookkeeper and was employed by the Company for many years.

The employee, Gerald Tuppker, is Vice-President and a member of the Board of Directors for a period of three (3) years, and owns stock in the Company.

Charles V. Brown, the other employee, complete the employees involved herein. They testified that they understood the vouchers and knew how the time was allocated and compensated for.

We call the Court's attention to the fact that this Court, in *Walling* v. *A. H. Belo, Corporation,* 316 U.S. 624, upheld a similar wage arrangement.

The petitioners now show to the Court that it is necessary for the employees to know how much compensation they will receive per month or per week, as they have obligations and they cannot work without some agreement as to how much they will make. As long as they are paid more than the minimum wage, and as long as they understand how much the compensation is for the forty (40) hours per week, and how much the compensation is for overtime per week, there can be no violation of the law.

The purpose of the Wage and Hour Law, your petitioners believe and, therefore, allege, is to protect the employees, but it is not intended to be used for the purpose of punishing a generous employer based upon an imaginary technical violation.

SUMMARY

Can an employer assure his employees that he or she will receive a stipulated amount each month, payable, as in this case, semi-monthly, with the further knowledge on the part of the employer and the employees, that this compensation will be broken down into forty (40) hours per week at a certain rate, four (4) hours per week overtime and, in this case, there is written on each check, to each employee, the exact number of hours at "regular time" and the exact amount of "overtime" paid. This is no subterfuge to violate the Law, but is an honest effort by the employer to see that the employees earn a living and fair wages.

CONCLUSION

We, therefore, most respectfully petition and request this Honorable Court to review this case, as it is one of grave importance to the employer and to the employees; and to grant this petition and reverse the opinion of the United States Court of Appeals Tenth Circuit.

Most respectfully submitted,

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August, 1967

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit
JUN 5 1967
WILLIAM L. WHITTAKER
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9083 - JUNE 1967 TERM

TRIPLE "AAA" COMPANY, INC., and D. G. CARPENTER, Appellant, v. W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Appellee.	Appeal From The United States District Court For The Western District of Oklahoma.

John B. Ogden, Oklahoma City, Okla., for Appellants.
Helen W. Judd, Attorney, United States Department of Labor, Washington, D.C. (Charles Donahue, Solicitor of Labor, Bessie Margolin, Associate Solicitor, Robert E. Nagle, Attorney, and Major J. Parmenter, Regional Attorney, with her on the Brief), for Appellee.

Before LEWIS, HILL and SETH, Circuit Judges.

[APPENDIX]

SETH, Circuit Judge.

The Secretary of Labor, appellee herein, commenced this suit in the United States District Court pursuant to 29 U.S.C.A. § 217 to enjoin violations of the Fair Labor Standards Act of 1938, 29 U.S.C.A. §§ 201-219, as amended.

The District Court found that the employer had violated the foregoing sections of the Act, as alleged by the Secretary, and the court therefore enjoined the employer from withholding overtime compensation in the total sum of $2,557.69 for four employees, to which they were entitled by virtue of the employer's past violations, and enjoined future violations of the Act by the employer. The employer has taken this appeal.

The Secretary in his complaint specifically alleged that the appellants, a corporation and its president, had since November 1962 violated 29 U.S.C.A. §§ 207(a) (1) and 211(c), which are sections of the Act relating to overtime compensation for employees and maintenance of employees' hourly work records by the employer. The appellants, who are referred to hereinafter as the employer, concede that business operations of the corporation subject it to the provisions of the Act.

Section 207(a) (1), supra, provides that an employee shall be compensated for all hours worked in excess of forty hours per week "at a rate not less than one and one-half times the regular rate at which he is employed." The four employees with whom we are here concerned testified during the trial regarding salary arrangements with the employer. Substantial undisputed evidence supports the trial court's findings that each of the four employees worked an average of forty-four hours per week during the time material to this action, and that each employee was paid the same salary for each semi-monthly pay period without additional compensation for any hours worked in excess of forty and without regard to the actual number of hours worked each week. The record establishes beyond

question that each employee was hired by the month, that no agreement existed between the employer and employees relating to any hourly wage scale, and that the monthly salary was meant by the employer to compensate the employees for an average work week of forty-four hours.

Determination of correct overtime compensation under the Act depends upon the "regular rate" at which the employee is employed, reduced to an hourly figure. Crawford Production Co. v. Bearden, 272 F.2d 100 (10th Cir.). During the trial the employer introduced copies of information stubs which were attached to the employees' paychecks. These stubs categorize and attribute earnings to both "regular" earnings and "extra" earnings (overtime). The stubs, as records of earnings, are not conclusive, for it is clear from the employees' testimony that each of them received the same salary for each pay period whether they actually worked thirty-eight, forty, forty-four, or forty-six hours per week. Because the amount of each employee's paycheck was unaffected by the actual number of hours worked, the inescapable conclusion is that monthly salary determines only the "regular rate" and includes no provision for overtime. Thus the specified monthly salary was meant to compensate each employee for all hours worked each week, regardless of their number. See Overnight Motor Co. v. Missel, 316 U.S. 572; Crawford Production Co. v. Bearden, supra; Mitchell v. Caldwell, 249 F.2d 10 (10th Cir.); Patsy Oil & Gas Co. v. Roberts, 132 F.2d 826 (10th Cir.).

Certain tables and charts, prepared for the trial, were offered by the employer to show the manner in which the amount of each employee's semi-monthly paycheck was broken down to include forty hours at a specified hourly rate and overtime compensation for hours in excess of forty. These charts and tables appear to be nothing more than after-the-fact computations. The testimony of the four employees reveals that the charts and tables do not reflect the realities of the situation in terms of an underlying

agreement between employer and employees regarding any regular rate of compensation for the first forty hours worked in each week. We conclude that such an agreement relating to the regular rate is crucial when an employer pays a flat monthly salary for an average work week of more than forty hours. Compare Overnight Motor Co. v. Missel, 316 U.S. 572, with Walling v. A. H. Belo Corp., 316 U.S. 625; see Crawford Production Co. v. Bearden, 272 F.2d 100 (10th Cir.); McComb v. Sterling Ice & Cold Storage Co., 165 F.2d 265 (10th Cir.); Seneca Coal & Coke Co. v. Lofton, 136 F.2d 359 (10th Cir.); Patsy Oil & Gas Co. v. Roberts, supra; Nunn's Battery & Electric Co. v. Goldberg, 298 F.2d 516 (5th Cir.).

For purposes of computing overtime compensation to be recovered by the four employees, and to compute the statutory "regular rate" of compensation, the trial court found, and the employer agreed, that each employee had worked at least an average of forty-four hours per week. The trial court computed the overtime compensation by taking the monthly salary times twelve months and then dividing by fifty-two weeks. This figure represents the weekly compensation. The weekly compensation was then divided by forty-four hours, the number of hours the weekly salary was meant to compensate. The resulting figure is the hourly "regular rate" for forty-four hours. Because the employees had already received the "regular rate" for the four overtime hours, as computed above, the trial court added one-half the regular rate to the four overtime hours for each week. We find no error in the trial court's method of computing overtime compensation to be recovered from the employer. See the Overnight Motor, Crawford Production, Seneca Coal, and Patsy Oil & Gas cases, supra. On appeal the employer has relied on Walling v. A. H. Belo Corp., 316 U.S. 624, as authority for his argument that the employees' semi-monthly paychecks included forty hours at the regular rate and compensation for overtime at the statutory rate. The facts in the Belo case are wholly dissimilar from the facts in the case at bar.

The employer's brief on appeal contains the contention that "some of the employees, being officers of the company and stockholders, are not covered by the Act." Beyond this bare assertion, the employer's brief contains no further reference to the various exemptions permitted by 29 U.S.C.A. § 213, nor to the evidence that might support an exemption, nor to cases that might support his contention. It appears that the exemption argument has been abandoned on appeal. An argument that an employee is exempted from coverage of the Act is in the nature of an affirmative defense, and it is the employer's burden to establish the exemption clearly. Legg v. Rock Products Mfg. Co., 309 F.2d 172 (10th Cir.); Joseph v. Ray, 139 F.2d 409 (10th Cir.). We are satisfied from the record that the evidence fails to establish for any employee an exemption under § 213 or the Secretary's regulations in 29 C.F.R. § 541.1.

The trial court's injunction restrains the employer from withholding overtime compensation to which its employees are entitled by virtue of violations of the Act occurring before the trial, and restrains future violations of the overtime and record keeping sections of the Act. It appears that the Department of Labor first warned the employer of alleged noncompliance with the Act in 1958, and that a subsequent investigation in 1964 disclosed conditions which resulted in the instant action. The trial court has broad discretion to fashion its decree according to the circumstances of each case. Buckley v. Wirtz, 326 F.2d 838 (10th Cir.), and cases cited therein. In Mitchell v. Hertzke, 234 F.2d 183 (10th Cir.), this court held that an injunction restraining future violations of the Act is not punishment for past violations, but to prevent future violations in the public interest. Because the employer's business operations are of a continuing nature, and considering the history of the employer's relations with the Department of Labor, we conclude that the injunction reveals no abuse of the trial court's discretion. The employer's brief on appeal expresses a willingness to comply with the provisions of the Act in

the future, and the injunction does nothing more than require compliance with the law for the public benefit. See Wirtz v. B. B. Saxon Co., 365 F.2d 457 (5th Cir.).

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 582

TRIPLE "AAA" COMPANY, INC., ET AL., PETITIONERS

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.) is reported at 378 F. 2d 884. The district court's findings and conclusions are not officially reported, but appear at 17 WH Cases (C.C.H.) 332 and 53 Lab. Cases (C.C.H.) ¶ 31,787.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1967. A petition for rehearing *en banc* was denied on July 10, 1967. The petition for a writ of certiorari was filed on September 7, 1967. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' payment to employees of a fixed semi-monthly salary, regardless of the number of overtime hours worked in any workweek, violated the requirement of Section 7(a) of the Fair Labor Standards Act.

STATUTE INVOLVED

Section 7(a) of the Fair Labor Standards Act of 1938, 52 Stat. 1060 *et seq.*, as amended (29 U.S.C. (Supp. II) 207(a)), provides in pertinent part:

> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed * * *.

STATEMENT

The Secretary of Labor brought this action under Section 17 of the Fair Labor Standards Act (29 U.S.C. 217), asking the court to restrain petitioners from continuing to violate the overtime and record-

keeping provisions of the Act, and from continuing to withhold payment of overtime compensation due certain employees under the Act. Petitioners denied the violations, claiming the employees in question had been paid at regular hourly rates, on the basis of which their semi-monthly paychecks were properly allocated between straight time and overtime pay.

After a trial of the issues, the district court found that each employe involved had not been paid overtime compensation for hours worked in excess of 40 per week, but had instead received the same semi-monthly pay regardless of the number of hours worked each week or the number of hours worked in a pay period (R. 11). Due to petitioners' failure to keep accurate records of their employees' hours, as required under the Act, the court could not determine the exact number of overtime hours worked, but found that each employee had worked an average of at least 44 hours a week (R. 12). The court thereupon enjoined future violations of the Act by petitioners, as well as the continued withholding of a total of $2,557.69 due to four employees by virtue of petitioners' past violations.

The court of appeals affirmed, concluding that "[s]ubstantial undisputed evidence" supported the district court's findings (Pet. App. ii). Continuing, the court below stated, "The record establishes beyond question that each employee was hired by the month, that no agreement existed between the employer and employees relating to any hourly wage scale, and that the monthly salary was meant by the employer to compensate the employees for an average work week

of forty-four hours" (*id.* at ii-iii). Accordingly, the court of appeals agreed with the district court that under well-established principles the salaries paid such employees included no provision for overtime—and thus violated Section 7(a) of the Act (*id.* at iii-iv). It also concluded that the trial court did not abuse its discretion in enjoining future violations by petitioners (*id.* at v-vi).

ARGUMENT

The decision below correctly applies the governing principles established by this Court in *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, 581, and *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U.S. 88, 93, and is in accord with all other pertinent decisions of both the Tenth Circuit and other courts of appeals.[1] Further review is thus not warranted.

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[1] See, *e.g.*, *Crawford Production Co.* v. *Bearden*, 272 F.2d 100, 104-105 (C.A. 10); *Patsy Oil & Gas Co.* v. *Roberts*, 132 F.2d 826, 827 (C.A. 10); *Seneca Coal & Coke Co.* v. *Lofton*, 136 F.2d 359, 362-363 (C.A. 10), certiorari denied, 320 U.S. 772; *McComb* v. *Sterling Ice & Cold Storage Co.*, 165 F.2d 265, 270 (C.A. 10); *Nunn's Battery & Electric Co.* v. *Goldberg*, 298 F. 2d 516, 519-520 (C.A. 5); *Beechwood Lumber Co.* v. *Tobin*, 199 F.2d 878, 881 (C.A. 5); *Wirtz* v. *Flame Coal Company*, 321 F.2d 558, 562 (C.A. 6); *Bumpus* v. *Continental Baking Co.*, 124 F.2d 549, 552 (C.A. 6), certiorari denied, 316 U.S. 704; *Walling* v. *Stone*, 131 F.2d 461, 463 (C.A. 7); *Carleton Screw Products Co.* v. *Fleming*, 126 F.2d 537, 540-541 (C.A. 8), certiorari denied, 317 U.S. 634; *Watkins* v. *Hudson Coal Co.*, 151 F.2d 311, 317-319 (C.A. 3), certiorari denied, 327 U.S. 777; *Adams* v. *Union Dime Savings Bank*, 144 F.2d 290, 292 (C.A. 2), certiorari denied, 323 U.S. 751 ~~(C.A. 2)~~; *McComb* v. *Norris*, 177 F.2d 357, 359 (C.A. 4). A number of these cases were cited and relied upon in the opinion of the court below (see Pet. App. iii-iv).

It has been conclusively settled by the above-cited decisions of this Court, as well as the decisions referred to in the accompanying footnote, that the payment of a regular weekly, semi-monthly or monthly salary does not include the statutory overtime premium for weekly hours in excess of 40, in the absence of an agreement specifying a regular hourly rate of pay and not less than one and one-half times that rate for each weekly hour of overtime.[2] In the instant case, as found by both courts below, "no agreement existed between the employer and employees relating to any hourly wage scale," and the record plainly demonstrated that "the amount of each employee's paycheck was unaffected by the actual number of hours worked" (Pet. App. iii). Accordingly, as the court of appeals stated, "the inescapable conclusion is that monthly salary determines only the 'regular rate' and includes no provision for overtime" (*ibid.*).[3]

Walling v. *A. H. Belo Corp.*, 316 U.S. 624, relied on by petitioners (Pet. 4), is inapposite here. In *Missel* this Court distinguished that case by pointing out that in *Belo* the employment contracts "speci-

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[2] See Pet. App. iv, where the court of appeals stated that "such an agreement relating to the regular rate is crucial when an employer pays a flat monthly salary for an average work week of more than forty hours."

[3] Under such circumstances, as the *Missel* decision established, the "regular rate" is determined by reducing the employee's salary to its weekly equivalent, and dividing the result by the number of weekly hours the salary is intended to compensate. One-half that rate times the number of overtime hours worked produces the amount of overtime which must be paid under the Act (see 316 U.S. at 580, and n. 16).

fied an hourly rate and not less than time and a half for overtime, with a guaranty of a fixed weekly sum and required the employer to pay more than the weekly guaranty where the hours worked at the contract rate exceeded that sum" (316 U.S. at 581). The doctrine of the *Belo* case was subsequently codified in Section 7(e) of the Act which, with certain additional limitations, now contains express authorization for contracts containing such provisions.[4] It is evident from the findings of the courts below that the conditions required for such contracts are not met in the instant case, and that *Belo* was properly distinguished by the court of appeals (see Pet. App. iv).

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[4] During the period pertinent to this litigation, Section 7(e), which became Section 7(f) as of February 1, 1967, provided as follows (63 Stat. 214, as amended, 75 Stat. 69):

> No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, * * * if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in * * * section 6 * * * and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Acting Solicitor General.

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OCTOBER 1967.

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